of appeals relied on a "tainted" record transcript in reaching its decision in this case. The record shows that on May 4th, 1988, Saporito complained to two FPL supervisors, Harley and Tomaszewski, about problems with safety related clearance procedures on a highly visible work order. [T.735-45][1989 record]. Saporito's safety concerns surfaced while the Institute for Nuclear Power Operations ("INPO") was conducting an on-site evaluation at the Turkey Point nuclear plant, and, significantly, INPO investigators observed the very job about which Saporito raised safety concerns. [June 30, R.D.&O. at 6]. Saporito escalated his safety concerns through a letter to INPO on May 19th, 1988 and copied the same to FPL management. [RX-51]. In his letter to INPO Saporito questioned whether Harley was properly trained to perform certain safety related clearance procedures. Within days of Saporito's letter to INPO, which questioned the competence of FPL supervisors to carry out safety related responsibilities, Harley recommended that Saporito be disciplined. [T.1829-30][1989 record]. The timing of FPL's disciplinary actions in May of 1988 could not be more obvious. On May 11th, 1988, Saporito received the first in a series of retaliatory disciplinary actions by FPL. Saporito's co-workers perceived that Harley was trying to get Saporito fired. One employee felt that Harley was out to get rid of Saporito. [T.2160][[1988 record]. Another employee testified that Harley made comments that he was out "to get" Saporito and that was common knowledge: [T.552][1988 record]. In fact, Harley even agreed that employees in the shop "probably interpreted it that way." [T.1863-64][1988

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their own "privately" recorded hearing transcripts into the official Department's record transcripts. Thus, the court of appeals failed to conduct a proper *de novo* review of the record as it was required to do in reaching its decision.

record]. Harley conceded that he considered Saporito to be "an irritant." [T.1864[1988 record]. Notably, it was not just a perception that Harley was trying to get Saporito fired after he reported safety concerns in May 1988. Harley did request FPL management to fire Saporito in late May or early June 1988. Odom the FPL vice president, confirmed that in early June 1988, at the urging of Harley's manager, Kappes, the FPL Industrial Relations ("IR") department reviewed Saporito's personnel record to determine whether Saporito could be discharged. [T.1513-14][1988 record]. Significantly, the IR department concluded in June 1988, that there was insufficient reason to terminate Saporito's employment. *Id.*

Odom's testimony on this issue corroborates that Harley was out to get Saporito fired shortly following Saporito's protected activity in May 1988. If further supports that the retaliatory actions taken against Saporito in May and June 1988, had a "chilling effect" on Saporito's co-workers who correctly believed that Harley was trying to get Saporito fired. In an even more disturbing incident following Saporito's May 1988, protected activity, Harley gave Saporito a hazardous job assignment that required Saporito to enter the containment vessel of the nuclear plant (a high radiation area) with protective gear and a respirator. Due to high temperatures of approximately 113 degrees Fahrenheit, and a lack of air in the respirator, Saporito became fatigued and , consequently, went home sick. After Saporito went home sick from extreme heat exposure, Harley boasted to other workers about causing Saporito's illness, by stating, "I got him, I got him, I sent him home sick." [T.2159][1988 record]. Notably, Harley admitted that right after Saporito became ill he commented that "Maybe he [Saporito] should have died." [T.1863][1988 record] (emphasis added). In

other words, Harley wished Saporito had died when he experienced health problems in the containment vessel.

FPL subjected Saporito to further discrimination after he made complaints to the NRC and to the DOL in the fall of 1988, actions which themselves constituted protected activity.[6] One harassment incident involved threatening behavior by Koran, an FPL supervisor, after Saporito engaged in protected activity. In another incident, Boger, FPL's radiological training instructor, shouted obscenities at Saporito after he asked Boger questions about topics covered in questions on a safety training exam taken by Saporito. [T.1651-52][1988 record]. The Boger incident, in particular, establishes a prima facie case because Saporito's questions to Boger were protected activity. Notably, the adverse action Saporito received in November and December 1988, including his termination in December 1988, occurred immediately after he engaged in additional protected activity. Saporito was in contact with the NRC between September and December of 1988, and he filed complaints under the ERA with the DOL in October and November 1988. FPL learned these facts, which were common knowledge at Turkey Point, directly from the NRC during these months. Odom's questioning of Saporito on November 23rd, 1988; FPL's placing of Saporito to restricted status; demeaning job assignments [T.812-13; T.1760][1988 record], and Odom's attempted interrogation of Saporito on November 30, 1988; related directly to

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[6] On September 29, 1988, Saporito sent a letter to the NRC documenting his safety concerns and alleging that he was being harassed for reporting safety concerns. By letters dated October 14, 1988, October 31, 1988, and November 8, 1988, Saporito filed complaints with the Department of Labor ("DOL") pursuant to Section 210 of the ERA, alleging retaliation.

Saporito's protected activity and shortly followed Saporito's contacts with the NRC as well as his filing of ERA complaints with the DOL. In addition, FPL's order that Saporito see a company doctor on December 16th, 1988, and the subsequent discharge of Saporito on December 22nd, 1988, each closely followed Saporito's protected activity.[7]

Clearly, the court of appeals failed to conduct a proper *de novo* review of this case in reaching its decision in case No. 98-5631, where the Secretary failed to find that Saporito made out a prima facie case in Case No. 89-ERA-07. Moreover, the court of appeals failed to conduct a proper *de novo* review of this case in reaching its decision in case No. 98-5631, were the record does not support the Secretary's decision in the consolidated cases incorporating Saporito termination. The record evidence proffered by Saporito must raise an inference that the protected activity was the likely motive for the adverse action. Saporito met his burden by showing the proximity in timing of the adverse action to the protected activity. Moreover, a careful reading of the ARB's decision in ARB No. 98-008 clearly shows that the ARB failed to apply controlling law in reaching their decision.

The Secretary held that,

> ". . . Saporito's refusal to obey Odom's direct order to divulge his safety concerns on November 23, 1988, was-"protected activity" and that FP&L violated the ERA when it later discharged Saporito." "I need not decide whether it is appropriate under the ERA to balance Respondent's interests in immediate

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[7] Collectively, all of the harassment incidents and adverse action that occurred between May and December 1988, satisfy a prima facie case of "hostile work environment." *See, Mitchell v. APS/ANPP,* ALJ Case No. 91-ERA-9, slip op. of ALJ at 36-37 (July 2, 1992).

discovery of potential threats to public health and safety against complainant's right to protection for reporting his safety concerns outside the chain of command because I find FP&L's rational for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous.[8] Saporito told Odom on November 23, 1988, when Odom gave him a 'direct order' to tell Odom his nuclear safety concerns, T.1438I, that Saporito 'would only talk to the NRC.' T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns 'at his first available opportunity' and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and

[8] During the remand hearing in 1997, Odom had no reasonable explanation for whiting-out his personal calendar "only" for the day of November 20th, 1988, the very day that Odom called the NRC by telephone and spoke with Oscar DeMiranda and with George Jenkins about Saporito. The NRC advised Odom that Saporito had not raised any "immediate" safety concerns regarding operations at Turkey Point, and that the agency would certainly contact him [Odom] or FPL immediately, if such concerns were later learned.

> Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom,[9] that Saporito was ill, and Saporito's reason for taking 12 days sick leave[10] after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA . . . "

See, Secy' Decision and Remand Order, (June 3, 1994 at 3-4.)

The ARB was fully aware of the Secretary's directive to the ALJ on remand, to review the record and submit a new recommended decision on whether FPL would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *See, ARB No. 98-008, Final Decision and Order* (Aug. 11, 1998 at 1-2). The court of appeals failed to conduct a proper *de novo* review of the this case in considering whether the Secretary and later the ARB, should have found causation in Saporito's protected activity in contacting INPO to raise safety concerns about operations at Turkey Point in early 1988; and whether FPL's adverse actions in disciplining Saporito closely

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[9] At the remand hearing, Odom testified that he made the decision to fire Saporito prior to ordering Saporito to see the company doctor. Thus, all of FPL's reasons for discharging must be found to be pretexual and not true, and that the real reason for Saporito's discharge was his engagement in protected activity.

[10] At the remand hearing, Kappes admitted under oath that Saporito was paid for all the sick days that he had taken, and that FPL only paid for sick time when the sick time was taken for legitimate reasons.

followed that protected activity. *See,* ARB No. 98-001 at 6. This glaring and fundamental error calls into question the reliability of the entire decision by the circuit court of appeals in case No. 98-5631. Notably, the most common fact used to establish retaliatory motive is evidence of timing. *See, Newkirk v. Cypress Trucking Lines, Inc.* Case No. 88-STA-17, slip op. of SOL at 8 (Feb. 13, 1989)("Adverse action closely following protected activity is itself evidence of an illicit motive.") The fact that an employer takes disciplinary actions shortly after an employee engages in protected activity is, unto itself, "sufficient to raise an inference of causation" to establish that element of the prima facie case. *Id. See, also, Ertel v.Giroux Bros. Transp., Inc.* Case No. 88-STA-24, slip op. of SOL at 24-25 (Feb. 16, 1989); *Priest v. Baldwin Assoc.,* Case No. 84-ERA-30, slip op. of SOL at 10 (June 11, 1986). Significantly, the court of appeals' decision in case No. 98-5631 did not even address the ample record evidence of timing in Case No. 89-ERA-07, yet the court of appeals concluded that there was no discriminatory motive established. The record however, amply demonstrates that all the adverse action taken by FP&L against Saporito occurred shortly after he engaged in protected activity.

Odom's questioning of Saporito about his safety concerns on November 23rd, 1988; FP&L's placing Saporito on restricted status; demeaning job assignments [T.812-13, 1760], Odom's attempted interrogation of Saporito about his safety concerns on November 30th, 1988, and later FP&L's requiring Saporito to see the company doctor and Saporito's discharge, shortly followed Saporito's contacts with the NRC as well as his filing ERA complaints with the DOL. Thus, because the court of appeals failed to consider Petitioner's *prima facie* case in ALJ 89-ERA-07 in deciding whether FP&L was motivated by

Petitioner's protected activity in ALJ No 89-ERA-17, its opinion in case No, 98-5631 is unsupported by substantial evidence, and is therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

3. The consolidated cases before this Court unquestionably present questions of dual motive. FP&L alleged it fired Saporito for three reasons: (1) for refusing to Obey Odom's order to reveal his safety concerns on November 23rd, 1988; (2) Saporito's refusal to stay late after his regular work day on November 30th, 1988, to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; [T.1445-46, 2024]; and (3) Saporito's refusal to be examined by a company doctor. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act the Secretary held to be protected under the ERA. *See, Sec'y Decision and Remand Order at 3-4,* (June 3rd, 1994). Here, all of FP&L's alleged reasons for discharging Saporito are inextricably intertwined with Saporito's protected activity and simply cannot be divorced from that protected activity. Thus, the court of appeals erred in not finding FP&L's rationale for discharging Saporito to be pretextual, and that the true reason and motivation for discharging Saporito was his engagement in protected activity.

4. In deciding No. 98-5631, the court of appeals failed to consider substantial record evidence which clearly shows that Odom, the FP&L Site Vice President over Turkey Point, lied under oath at hearing when Odom testified that [h]e required Saporito's attendance at a meeting on November 30th, 1988, to learn if there was any immediacy about any of Saporito's safety concerns that Saporito had communicated to the NRC about the Turkey Point

nuclear plant. The court of appeals also erred in failing to consider substantial record evidence which clearly shows that Odom's order that Saporito see a company doctor was pretextual insofar as Odom made the decision to discharge Saporito prior to requiring Saporito to see the company doctor, and that no matter what the outcome from Saporito's visit with the company doctor, Saporito was already discharged by Odom. Therefore, FP&L's alleged legitimate business reason for discharging Saporito because [h]e refused to be examined by the company doctor was pretextual and that the real reason for FP&L's discharging Saporito was his protected activity. To the extent that FP&L's ordering Saporito to be examined by a company doctor was a pretext, FP&L's requiring Saporito to attend a meeting with Odom on November 30th, 1988, to reveal his safety concerns, to learn if there existed any immediacy to those safety concerns was also a pretext and not true, and that the real reason for FP&L's discharging Saporito was his protected activity.[11]

5. The court of appeals also ignored substantial record evidence that clearly shows that FP&L's suspension and discipline of Saporito was not

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[11] Here again, on the morning of November 30th, 1988, Odom telephoned the NRC and learned that none of Saporito's safety concerns had any immediacy about them, and that the NRC would immediately contact Odom and FP&L should any such safety concerns come to light. Odom therefore lied under oath with respect to his testimony that he ordered Saporito to a meeting on November 30th, 1988 to learn if any of Saporito's safety concerns had any immediacy about them. Moreover, Odom whited-out the day of November 30th, 1988, in his calendar that he maintained at Turkey Point. No other days were whited-out by Odom. Clearly, Odom intended to mislead the NRC and intended to mislead the DOL in covering up his contact with the NRC on the morning of November 30th, 1988. Additionally, FP&L withheld Odom's calendar from Saporito during discovery at the 1989 hearing.

consistent with discipline (including discharge, suspension, and demotion) it had meted out to other employees under similar circumstances. Evidence contained in RX-111 supports the fact that FP&L treated Saporito more harshly than other employees accused of disobeying management orders. Kappes, a subordinate manager to Odom, conceded at trial that another employee who refused [h]is direct orders on numerous occasions (and more times than Saporito allegedly refused orders) was not fired [T.2058-63]. Unlike Saporito, this other employee was afforded a meeting with union stewards and management to discuss his repeated failures to comply with direct orders before discipline was imposed. *Id.* Significantly, this other employee was only suspended rather than fired like Saporito. Moreover, FP&L maintained a company policy requiring discipline of its employees, like Saporito, to be handled at the lowest level of management. In contrast, Saporito's immediate supervisor, Verhoeven, was not permitted any role in the disciplinary actions taken against Saporito. Rather, FP&L failed to utilize its progressive discipline policies in Saporito's case which provided for lesser penalties other than discharge. FP&L deviated from its own disciplinary policies and gave Saporito the harshest discipline when company policies called for less penalties. Notably, FP&L did not provide Saporito any rights to contest or to challenge his discipline pursuant to the union contract maintained between FP&L and the International Brotherhood of Electrical Workers which Saporito was a member.

The court of appeals erred in deciding No. 98-5631, in failing to properly review the ARB's decision in ARB No. 98-008, in which the ARB held that:

> ". . . Here Odom clearly had a valid purpose in wanting to question Saporito about his safety

concerns: to learn whether any of those concerns had immediate significance for public health and safety. . ."

Id. at 9.

In contrast, the Secretary held in his June 3rd, 1994, Decision and Remand Order that:

"I need not decide whether it is appropriate under the ERA to balance Respondent's interests in immediate discovery of potential threats to public health and safety against Complainant's right to protection for reporting his safety concerns outside the chain of command because I find FP&L's reason for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a 'direct order' to tell Odom his nuclear safety concerns, T.1438I, that Saporito 'would only talk to the NRC.' T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns 'at the first available opportunity' and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. . ."

Id. at 2-4.

As stated earlier, Odom telephoned the NRC on the morning of November 30th, 1988, and learned first hand that Saporito had not raised any nuclear safety

concerns that had any immediacy about them. In addition, the NRC assured Odom that the agency would immediately contact him or FP&L should they later learn of any such safety concerns. Clearly, the substantial record evidence shows that Odom lied under oath and attempted to cover-up his contacts with the NRC[12] by obliterating his calendar entries on the very day of November 30th, 1988. Despite this overwhelming substantial record evidence, the court of appeals ruled against Saporito in deciding case No. 98-5631. Notably, Odom conceded at the remand hearing that on November 30, 1988, he was told by Jenkins of the NRC that the agency was not aware of any immediate significant safety issues raised by Saporito, and that if there were concerns that the NRC thought he [Odom] needed to know, they would tell him. Odom believed in good faith that the NRC would tell him if there was an immediate nuclear

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[12] On the morning of November 30th, 1988, Odom placed a telephone call to NRC Region II seeking information about Saporito's nuclear safety concerns. The record shows that "Odom said his reason for calling was to report that . . .[Saporito] has not provided any safety concerns. . .Odom said that . . . Saporito said that the NRC has instructed. . .[Saporito] not to provide safety concerns to the licensee. . .Odom said 'has he given you people any safety concerns.' Jenkins responded that we do not divulge information that is exchanged between an individual and the NRC. Odom said that he understood." "Odom said he needed to know if . . . [Saporito] had provided any information of significant safety and Jenkins responded that we are currently unaware of any immediate significant safety issues. Odom said that if we were to at any time gain any information of an immediate safety significance to please notify him immediately as he said, 'I need to know that information.' Jenkins said that we would certainly cooperate if that were the case." *See, Attachment One,* at pages entitled "Memorandum for Case File" dated November 30, 1988, included with Petitioner's June 29, 2004, Answer to Respondent's Memorandum in Opposition to Complainant's Supplemental Motion for Reconsideration.

safety concern. [T.520-22]. Therefore, it was incumbent upon the circuit court of appeals to find, as did the Secretary, that:

> ". . . FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and that it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. . ."

June 3, 1994, Decision and Remand Order at 3-4.

The court of appeals in deciding No. 98-5631, failed to properly apply a dual motive analysis to this case. Clearly, the ARB's decision is wholly unsupported by substantial record evidence, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *See, Price Waterhouse v. Hopkins,* 490 U.S. 228, 252, 109 S. Ct. 1775, 1791 (1989) where the court held that:

> ". . . The employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. . . The legitimate reason must be both sufficient to warrant the employer's action and it must have motivated the employer at the time of the decision. . . It is not enough that the decision was motivated in part by the legitimate reason. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision. . ."

Id.

Here, the substantial record evidence clearly shows that Odom did not have a valid purpose in wanting to question Saporito about his safety concerns on November 30th, 1988, because Odom learned from the NRC on that very morning, that none of Saporito's nuclear safety concerns had any immediacy about them. Despite this substantial and overwhelming record evidence, the court of appeals ruled against Saporito in No. 98-5631.

6. The court of appeals summarily dismissed petitioner's appeal for reconsideration of its decisions in case No. 05-10749-DD and No. 98-5631, and later rejected *pro se* petitioner's subsequent motion for reconsideration in No. 98-5631, stating that the court of appeals had dismissed that matter in deciding No. 05-10749-DD. Petitioner argues here that the court of appeals erred in summarily dismissing his petition for review of case No. 98-5631, in granting Intervenor's motion to dismiss on *res judicata* grounds. Significantly, the court of appeals' ruling in No. 98-5631, is not subject to the doctrine of *res judicata*, as the court of appeals is free to reconsider its own decisions as a matter of law. In *Rudd,* the court held that:

> . . . it was "not bound by the law of case' doctrine, which is discretionary and does not limit our power to reconsider our decision prior to final judgment if we determine that our earlier ruling was erroneous."

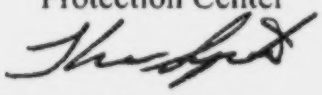
See, Ruud v. Westinghouse Hanford Co., ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33, (ARB Apr. 18, 2002). Here, the court of appeals has inherent authority to reconsider its decision in case No. 98-5631, if it determines that its earlier ruling was erroneous. Additionally, the Federal Rules of Civil Procedure, Rule 60(b)(6) provides the court of appeals authority to reconsider its earlier ruling in No.

98-5631, and to relieve Saporito from a final judgment of the court of appeals.

CONCLUSION

For all the above stated reasons, this petition for writ of certiorari should be GRANTED. In the alternative, this Court should vacate the court of appeals' decision in this consolidated case and REMAND this case for a new hearing on the merits *de novo.*

Respectfully submitted,
National Environmental
Protection Center



Thomas Saporito
pro se petitioner
11420 U.S. Highway One,#171
North Palm Beach, FL 33408
Telephone: 561-202-8797

APPENDIX

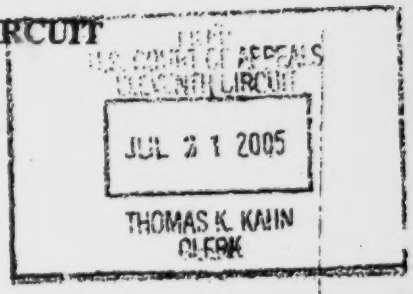
1. July 21, 2005, No. 05-10749-DD, Order of the Court of Appeals denying petitioner's motion for reconsideration of the court of appeal's June 2, 2005, Order. Before Circuit Judges: Carnes, Hull and Wilson.

2. June 2, 2005, No. 05-10749-DD, Order of the Court of Appeals granting intervenor's motion to dismiss appeal on res judicata grounds. Before Circuit Judges: Tjoflat, Dubina and Carnes.

3. August 3, 1999, No. 98-5631, Order of the Court of Appeals denying petitioner's petition for review. Before Circuit Judges: Cox, Black and Carnes.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 05-10749-DD

THOMAS SAPORITO,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review from a Final Order
of the Administrative Review Board

BEFORE: CARNES, HULL and WILSON, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of this Court's June 2, 2005, Order, is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 02 2005
THOMAS K. KAHN
CLERK

No. 05-10749-DD

THOMAS SAPORITO,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review from a Final Order
of the Administrative Review Board

BEFORE: TJOFLAT, DUBINA and CARNES, Circuit Judges.

BY THE COURT:

Intervenor's motion to dismiss this appeal on res judicata grounds is GRANTED.

Appellee's motion to file its brief out of time is DENIED AS MOOT.

Appellant's motion to strike Intervenor's brief as untimely is DENIED AS MOOT.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPE
ELEVENTH CIRCUI
AUG 03 1999
THOMAS K. KAHN
CLERK

No. 98-5631
Non-Argument Calendar

Case Nos. 89-ERA-7, 89-ERA-17

THOMAS J. SAPORITO, JR.,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review of the Final Decision and Order of the United States Secretary of Labor

(August 3, 1999)

Before COX, BLACK, and CARNES, Circuit Judges.

PER CURIAM:

Thomas J. Saporito, Jr. petitions for review of the Secretary of Labor's dismissal of his complaints filed pursuant to the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851. Saporito argues that the Secretary's dismissal of Case Nos. 89-ERA-7 and 89-ERA-17 should be reversed because proper legal standards were not applied and the decisions are not supported by substantial evidence.[1]

This court's review is deferential. We may overturn the Secretary's decision only if the decision is "unsupported by substantial evidence" or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E).

The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied.

PETITION FOR REVIEW DENIED.[2]

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[1] The Secretary says that Saporito's petition seeking review is timely as to both cases; Florida Power & Light Company, intervener, takes the position that the petition is timely only in Case No. 89-ERA-17. The record reflects that the two cases remained consolidated throughout, and we conclude that the petition to review is timely as to both cases.

[2] The request for oral argument is denied.

Supreme Court, U.S.
FILED

05 - 717 OCT 17 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Thomas Saporito, Petitioner

v.

U.S. Department of Labor, et al.

On Petition For Writ Of Certiorari
To The Circuit Court of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

Thomas Saporito
pro se petitioner
National Environmental
Protection Center
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Telephone: 561-202-8797

Nov. 30th, 2005

SUPPLEMENTAL APPENDIX

1. December 17, 2004, Final Decision and Order, Administrative Review Board. Before Administrative Appeals Judge Wayne C. Beyer and Chief Administrative Appeal Judge M. Cynthia Douglas.

2. August 11, 1998, Final Decision and Order, Administrative Review Board. Before Member, Paul Greenberg and Acting Member, Cynthia L. Attwood.

U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS J. SAPORITO, JR., **ARB CASE NO. 04-079**

COMPLAINANT, **ALJ CASE NOS. 89-ERA-7**
89-ERA-17

v. **DATE: December 17, 2004**

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thomas J. Saporito, Jr., pro se, *Boynton Beach, Florida*

For the Respondent:
Mitchell S. Ross, Esq., Ellen S. Malasky, Esq., *Florida Power & Light Company, Juno Beach, Florida*

James S. Bramnick, Esq., *Akerman Senterfitt, Miami, Florida*

FINAL DECISION AND ORDER

This matter arises under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1989) (ERA) and implementing regulations, 29 C.F.R. Part 24

(1989).[1] Petitioner Thomas Saporito objects to a Final Decision and Order issued by the Board in 1998 and affirmed by the Eleventh Circuit Court of Appeals in 1999. *Saporito v. Florida Power & Light Co.*, ARB No. 98-008, ALJ Nos. 89-ERA-7, 89-ERA-17 (Aug. 11, 1998), *aff'd*, 199 F.3d 130 (11th Cir.1999) (unpublished table decision), *reh'g en banc denied*, 210 F.3d 395 (11th Cir. 2000). Saporito argues that the Board's 1998 decision contains errors of law and fact and is based in part on a defective hearing transcript. We conclude that the Eleventh Circuit decision bars consideration by us of Saporito's latest claims.

Section 5851 of the ERA protects employees in the nuclear power industry from adverse employment actions by employers wishing to discourage employees from speaking out about nuclear power hazards. Section 5851 achieves its protective goals by providing for agency investigations of employee complaints, agency adjudication of employee complaints, and judicial review of final agency decisions.

In 1989 Saporito filed an ERA whistleblower complaint against his employer, Florida Power & Light. After investigation by the Labor Department and two hearings on the record, Labor Department Administrative Law Judgers (ALJs) twice issued recommended decisions dismissing Saporito's complaint on the merits. Saporito exercised his right to appeal the ALJ decisions to the Secretary of Labor and subsequently, to this Board. The Board ultimately issued a final agency decision and order dismissing Saporito's complaint for lack of merit. Saporito invoked his right to judicial review and appealed the Board's final decision and order to the United States court of Appeals for the Eleventh Circuit. The

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[1] Congress amended § 5851 in 1992. Pub. L. No. 102-486, Title XXIX, §§ 2902(a) to (g), (h)(2), (3), 106 Stat. 3123, 3124 (1992). This case arose in 1989, and none of the 1992 amendments pertain to the issues before us. Accordingly, we refer to the 1989 versions of § 5851 and implementing regulations.

Eleventh Circuit summarily affirmed the Board decision and denied Saporito's request for rehearing en banc.

The Eleventh Circuit decision is the final adjudication on the merits of Saporito's 1989 complaint. That decision stands as a complete bar to further review of the merits of Saporito's complaint. "[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S.Ct. 2906, 2918 (1983) (internal citation omitted).

Saporito casts some of his current objections as motions for "reconsideration" of our 1998 decision. Whatever authority we had to reconsider our own order was extinguished long ago by the Court of Appeals' conclusive disposition.

Accordingly, Saporito's petition for a new trial and motions for reconsideration are **DENIED** and this matter is **DISMISSED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : ***Thomas Saporito v. Florida Power & Light Company***

ARB CASE NO. : **04-079**

ALJ CASE NOS.: **89-ERA-7 & 17**

DOCUMENT : **Final Decision and Order**

A copy of the above-referenced document was sent to the following persons on

DEC 17 2004

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In the Matter of:

THOMAS J. SAPORITO, JR., **ARB CASE NO. 98-008**

COMPLAINANT, **ALJ CASE NOS. 89-ERA-7**
89-ERA-17

v. **DATE: AUG 11, 1998**

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case, arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § (1988),[1] was remanded to the Administrative Law Judge (ALJ) after the Secretary found that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to by pass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected [from discrimination under the ERA." Secretary's Decision and Remand Order (Remand Order) at 1. The Secretary held that "[c]overed employers who discipline or discharge an employee for such conduct have violated the ERA." *Id.* Further, the Secretary found that Respondent Florida Power and Light

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[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486 Stat. 2776 (Oct. 25, 1992), do not apply to this case in which the complaint was filed prior to the effective date of that Act.

Company (FP&L) violated the ERA when it discharged Complainant Thomas Saporito (Saporito) for three reasons, one of which was his protected refusal to reveal his safety concerns to FP&L managers and his insistence on speaking directly to the NRC. *Id.* at 6. The Secretary directed the ALJ to review the record and submit a new recommended decision on whether FP&L would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *Id.*[2]

The case then was assigned to a new ALJ, who held another evidentiary hearing and found that FP&L proved that it would have taken the same action even if Saporito had not engaged in protected activity. Recommended Decision and Order on Remand (R. D. and O.) at 32. In a lengthy decision, the ALJ explicitly held that "either of the . . . two [unprotected] insubordinate acts itself would have justified. . . Saporito's termination." *Id.* at 33. For the Reasons discussed below, we agree with the ALJ, and dismiss the complaints.

BACKGROUND

I. Facts

Saporito worked for FP&L from 1982 to December 22, 1988, in various positions at several of its nuclear and non-nuclear power plants, transferring frequently from one plant to another and from job to job under the job bidding system of the collective bargaining agreement. *See* Respondent's Exhibit R-50, attachment 2. Saporito transferred to the Turkey Point nuclear plant from the St. Lucie, Florida, nuclear plant on April 23, 1988, as an Instrument and Controls (I&C) Specialist. *Id.*[3]

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[2] The Secretary also denied FP&L's motion for reconsideration of the Remand Order, noting that the decision did not preclude FP&L from proving on remand that it would have discharged Saporito for legitimate reasons even if he had not engaged in protected activity. Order, Feb. 16, 1995.

[3] Saporito bid on but was not awarded a transfer back to St. Lucie as an I&C Specialist in May 1988. The position was awarded in July 1988 to an employee with less seniority than Saporito, and Saporito

At Turkey Point Saporito filed numerous grievances over a variety of issues.[4] He also posed questions – internally to FP&L, to the Nuclear Regulatory Commission, and to an organization of nuclear power plant operators known as the Institute of Nuclear power Operations[5] -- about whether FP&L followed proper procedures. *See* T. (Transcript of original hearing) 745; 891; 895; Complainant's Exhibit (C) 24. Saporito also raised questions about the competency and mental stability of two supervisors after he had disagreements with them. T.787; 792; 802-803; 1147-50.

In November 1988 John Odom, the site Vice President at Turkey Point, decided to engage a private law firm to investigate Saporito's charges regarding the mental instability of the two supervisors, as well as Saporito's charges of harassment and intimidation. T. 1156-57; 1418-24. Saporito refused to cooperate with this investigation until all his outstanding grievances were resolved. T. 1172; 1428; RT. (Transcript of hearing on remand) 476. Odom decided to attempt to settle the grievances personally so that Saporito would talk to the outside investigators. T. 1433; 1435. Odom scheduled a meeting with Saporito for November 23, 1988, to review his grievances and try to settle them. T. 1437. Two days before the meeting, Odom learned that Saporito had nuclear safety concerns. T. 1438; RT. 486.

The November 23 meeting took almost all day. Some of Saporito's grievances were settled, but Odom could not settle Saporito's grievance over the failure to be awarded the job at the St. Lucie plant because Saporito demanded payment of $500,000 in damages. T. 1438E; 1438G. Toward the end of this meeting, Odom asked Saporito if he had any nuclear safety concerns. T. 1438G-1438H. Saporito answered in the affirmative, but said he would only reveal his safety concerns to the Nuclear Regulatory Commission.

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filed a grievance over this denial of job award. *See* R-50 and discussion in text below.

[4] By Saporito's own count, he had filed 35 to 40 grievances in approximately six months. T.1172.

[5] INPO was established by the nuclear power industry to police itself after the Three Mile Island accident. T. 1967.

After asking Saporito several times to tell him his safety concerns, Odom issued a direct order that Saporito tell his concerns to the NRC as soon as possible. T. 1438J. Saporito requested access to many of the Plant Work Orders (PWO) in order to prepare a report to the NRC about his safety concerns. T. 1438I.

Following the meeting, Maintenance Superintendent Joe Kappes reported to Odom that several union representatives had told him they were concerned that Saporito did not really have any safety concerns, but that he might try to create some. Odom therefore decided to restrict Saporito from access to vital areas of the plant. T. 1438M - 1438N; 2016-2017; RT 109.

Odom met with Saporito again on November 28 and 29 and settled all of his outstanding grievances. T. 1438T-1439. Saporito was to be transferred to the St. Lucie plant. However, the transfer was delayed two weeks in order to give Saporito time to speak with the outside investigators at Turkey Point. T. 1439; RT. 110. FP&L also agreed to pay Saporito $100 per day for each day he would have been working at St. Lucie if he initially had been awarded the St. Lucie job. T. 1440. In order to accomplish this settlement, Odom persuaded the Senior Vice President of Nuclear Operations to require St. Lucie to accept Saporito's transfer. T. 1441; RT. 111, 380.

On November 30 Odom learned that Saporito had begun to discuss his nuclear safety concerns with the outside investigators FP&L had hired. Therefore, Odom thought that Saporito would reveal his safety concerns to him. T. 1444; 1477; RT. 117-18; 619. Odom felt an obligation as site Vice President to learn what Saporito's safety issues were as soon as possible in order to take action on them if necessary. T. 1447; RT. 118. He also wanted to arrange Saporito's access to the PWOs so that Saporito could prepare his report to the NRC. T. 1443-44; RT. 112; 619. Finally, because Odom was unsure whether Saporito understood what a nuclear safety issue was, he wanted to discuss that issue with Saporito as well.

Therefore, Odom told Kappes to inform Saporito that Odom wanted to meet with him. T. 1448. Kappes asked Jerry Harley, the I&C Production Supervisor, to find Saporito and tell him about the